### UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

D. R. HORTON, INC.	)
	, )
and	) Case 12-CA-25764
	)
MICHAEL CUDA,	)
an Individual	)
	)

# RESPONDENT'S ANSWERING BRIEF IN RESPONSE TO BRIEF FOR THE SECRETARY OF LABOR AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

Respondent D.R. Horton, Inc. ("D.R. Horton"), by its attorneys, hereby submits this answering brief in response to the "Brief for the Secretary of Labor and the Equal Employment Opportunity Commission as Amicus Curiae" ("Sec. Br.") filed with the Board on or around July 27, 2011. In support of this response, D.R. Horton states as follows.

# I. The Brief Filed By The Secretary And The EEOC Asks The Board To Consider Matters That Are Not At Issue In This Case

The Secretary of Labor ("the Secretary") and the Equal Employment Opportunity Commission ("the EEOC") spend the majority of their brief arguing the importance of collective actions as an enforcement mechanism and touting class and collective actions as being superior to individual actions.<sup>1</sup> The Secretary and the EEOC do not attempt to address the issue on which the Board requested amicus briefs. On June 16, 2011, the Board invited interested *amici* to file briefs addressing this issue:

<sup>&</sup>lt;sup>1</sup> With respect to the argument that class and collective actions are an important enforcement mechanism, D.R. Horton notes that the arbitration agreement at issue in this case does not in any way restrict the ability of the NLRB, the Department of Labor or the EEOC to bring an enforcement action on behalf of D.R. Horton employees, including class actions. Nor does the subject agreement preclude any employee from enforcing any statutory right or seeking relief.

Whether an employer violates Section 8(a)1) of the NLRA, 29 U.S.C. 158(a)(1), by enforcing a mutual arbitration agreement that requires employees to agree to submit all employment disputes to individual arbitration, waiving all rights to a judicial forum, where the arbitration agreement further provides that arbitrators will have no authority to consolidate claims or to fashion a proceeding as a class or collective action.<sup>2</sup>

The issue before the Board is not whether the Mutual Arbitration Agreement is enforceable under contract law principles or prevents employees from vindicating their rights under the FLSA.<sup>3</sup> The Secretary and EEOC's assertions that class and collective actions are "essential" or "necessary" tools for individual enforcement of statutory rights are misguided, as a review of the statutes the agencies are responsible for enforcing and their enforcement authority make apparent. Still, the only issue here is whether a mutual arbitration agreement that requires employees to submit all employment disputes to individual arbitration violates Section 8(a)(1) of the NLRA. The Secretary and the EEOC do not even attempt to address that issue in their brief. As such, their brief is of little (if any) use to the Board in deciding this case.<sup>4</sup>

### II. The Secretary And The EEOC Improperly Rely On Speculation Instead Of Applying The Facts Of This Case To The Applicable Law

The Board must make its decision based on the facts "on the record" and should not be influenced by irrelevant information outside those established parameters. 29 U.S.C. § 160(e); *NLRB v. Dynatron/Bondo Corp.*, 176 F.3d 1310 (11<sup>th</sup> Cir. 1999) (Board's factual determinations

<sup>&</sup>lt;sup>2</sup> The Company reasserts fully the facts and authorities it has previously presented in its earlier submissions in this case.

<sup>&</sup>lt;sup>3</sup> D.R. Horton notes that the arguments raised by the Secretary and the EEOC are arguably inappropriate for consideration by the Board, as the NLRA is not intended to address or dictate the procedures that may be used in enforcing statutes other than the NLRA itself.

<sup>&</sup>lt;sup>4</sup> The Secretary and EEOC's professed "experience" is neither relevant nor supported by reliable evidence. The collective experience of the Secretary and EEOC does not cover the resolution of countless privately resolved statutory claims under mandatory arbitration agreements like the one in this case (because they are not parties to those claims). Further, it is interesting that the Secretary does not even reference the "Bridge to Justice" initiative of the agency to refer individual claimants to attorneys to pursue their individual claims when the Department decides not to pursue individual, collective or class relief.

must be "supported by substantial evidence on the record considered as a whole"). The courts reject arguments – such as those of the Secretary and EEOC – that are "speculative and unsupported by the record." *International Brotherhood of Teamsters, Local 917 v. NLRB*, 577 F.3d 70, 78 (2<sup>nd</sup> Cir. 2009).

In their brief, the Secretary and the EEOC argue at length that a class action waiver is impermissible where it would prevent employees from vindicating their statutory rights. What the Secretary and the EEOC fail to do is set forth any facts to suggest that the agreement at issue in this case prevents D.R. Horton employees from vindicating their statutory rights. Instead, the Secretary and the EEOC rely on speculative theories that have no basis in the facts of the case. The fact that escapes the Secretary and EEOC is that the employee at issue in this case (Cuda), who voluntarily executed the mandatory arbitration agreement at issue, successfully vindicated his substantive rights under the FLSA.

In support of their apparent argument that class actions are inherently superior to individual actions (which is irrelevant to the issue of whether the subject arbitration agreement prevents employees from vindicating statutory rights), the Secretary and the EEOC offer such opinions as:

- "Employers tend to take class actions more seriously than individual actions because of their greater exposure." (Sec. Br. at 9).
- "Class actions allow plaintiffs to share the costs of litigation and pursue claims that would not justify individual actions." *Id.*.<sup>5</sup>
- "[Class actions] allow plaintiffs to seek evidence during discovery of class-wide violations, and they provide some protection against retaliation." (*Id.* at 10).

<sup>&</sup>lt;sup>5</sup> D.R. Horton notes that attorney's fees and costs may be available to employees who have suffered a violation of the statutes administered by the Secretary and the EEOC, whether in an individual action or in a class/collective action.

- "[Class actions] use judicial resources more efficiently and can protect employers against conflicting obligations." *Id.*<sup>6</sup>
- "The small individual amounts at issue [in FLSA claims] make it difficult for employees to vindicate their rights through individual actions." (*Id.* at 14).
- "Some individual employees, particularly immigrants with limited English-language skills, also may not sue because they are unaware that their legal rights have been violated, and the transient nature of work may prevent them from pursuing individual litigation against a former employer." (*Id.* at 15).

The Secretary and the EEOC do not provide any facts to suggest that these theories are supported by the facts of the present case. The Secretary and the EEOC do not even attempt to argue that it would be difficult for Michael Cuda or any other D.R. Horton employee to vindicate his or her rights through individual arbitration, nor is there any evidence on the record to suggest that is the case. More revealing, the Secretary and EEOC do not even acknowledge that the arbitration agreement at issue does nothing to inhibit their agencies from pursuing individual, class or collective actions.

<sup>&</sup>lt;sup>6</sup> The argument regarding use of judicial resources is irrelevant in light of the fact that the issue here is class <u>arbitration</u>, rather than litigation.

D.R. Horton also notes that the Secretary and EEOC, like the General Counsel, have not attempted to qualify in any way the remedy sought by them in this case. Presumably, if the Board were to accept the arguments of the Secretary and the EEOC, it would hold that Section 7 grants all employees the right to bring claims as a class, regardless of whether those employees satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure (which the Secretary and the EEOC repeatedly cite in their brief). Further, D.R. Horton notes that many of the arguments put forth by the Secretary and the EEOC are not specific to FLSA or Title VII-based lawsuits, but would apply to all forms of litigation. Therefore, a holding invalidating an arbitration agreement on those grounds would presumably apply equally to all contracts requiring mandatory arbitration and containing a class action waiver, including consumer contracts, mortgage loans, car loans, etc.

It follows that the end result of the remedy sought by the General Counsel, the Secretary, and the EEOC would be a dramatic increase in the number of class claims being brought in courts that are already overburdened by litigation. This result would run contrary to the public policy embodied by such statutes as the Federal Arbitration Act and the Class Action Fairness Act of 2005 (which was enacted in part to ease the burden of class action lawsuits upon courts).

<sup>&</sup>lt;sup>7</sup> The Secretary and the EEOC later acknowledge in their brief that the United States Supreme Court has actually "rejected an argument that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system . . . ." (Sec. Br. at 19) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)).

Interestingly, the Secretary and the EEOC actually acknowledge that employees can effectively vindicate their rights through individual arbitration. In discussing why they believe class actions are useful in enforcing the FLSA, the Secretary and the EEOC state: "These factors also indicate that as a practical matter a collective action is necessary in many cases to enforce employees' FLSA rights." (Sec. Br. at 15) (emphasis added). They go on to state in a footnote:

The Secretary of Labor and the EEOC are not saying that an employee can never vindicate his or her statutory rights in an individual action. When an employer like D.R. Horton, however, mandates that all its employee [sic] agree in advance not to pursue statutory rights in a collective or class action, it is highly likely that the agreement will prevent employees from enforcing at least some legitimate statutory claims and will be invalid as a matter of federal law on that basis.

(Id. at n.4) (emphasis added).

The Secretary and the EEOC thus acknowledge that employees can effectively vindicate their statutory rights in an individual action. This acknowledgment, coupled with the absence of any actual facts to suggest that D.R. Horton's employees will be unable to vindicate their substantive rights through individual arbitration, renders the Secretary and the EEOC's brief legally and factually baseless.

#### III. The Cases Cited By The Secretary And The EEOC Are Unpersuasive

The Secretary and the EEOC cite two distinguishable cases from a single district court to suggest that the agreement at issue in this case should not be enforced because it would prevent employees from effectively vindicating their statutory rights under the FLSA. Because they fail even to apply the holdings of those cases to the facts of this case, this argument should be given no credence by the Board.

For example, the Secretary and the EEOC cite *Sutherland v. Ernst & Young LLP*, 768 F. Supp.2d 547 (S.D.N.Y. 2011) as support for their argument that the arbitration agreement at

issue in this case should not be enforced. In *Sutherland*, the court refused to enforce an arbitration agreement where the employee in question had "shown that it would be prohibitively expensive for her to pursue her statutory claims on an individual basis." The Secretary and the EEOC have cited no facts to suggest this argument applies to the circumstances of this case. There is no evidence on the record to show that requiring Cuda or any other D.R. Horton employee to arbitrate their claims individually would be "prohibitively expensive." *See Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 92 (2000) (holding that "where . . . a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs."); *Adkins v. Labor Ready*, 303 F.3d 496 (4<sup>th</sup> Cir. 2002) (rejecting plaintiff's argument that arbitration was cost-prohibitive where plaintiff failed to present sufficient evidence of the costs that would be incurred through arbitration or the money that was at stake in the case).

The other case cited by the Secretary and the EEOC in support of this point is also distinguishable. In *Chen-Oster v. Goldman, Sachs & Co.*, 2011 WL 1795297 (S.D.N.Y. April 28, 2011), the District Court held that a class action was unenforceable because the employee had a "pattern-or-practice" claim under Title VII that could not be brought as an individual claim. That is not the case here. All of the substantive claims at issue here are capable of being arbitrated individually.<sup>8</sup>

Many of the other cases cited by the Secretary and EEOC either reinforce D.R. Horton's arguments or are inapposite. For example, in *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000), *14 Penn Plaze LLC v. Pyett*, 129 S.Ct. 1456 (2009), and *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4<sup>th</sup> Cir. 2002) the respective courts actually upheld the arbitration agreements at issue. Further, in *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6<sup>th</sup> Cir. 2003) and *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005), the respective courts dealt with arbitration agreements that prevented employees from receiving remedies that would have been available in court. Unlike in those cases, all the remedies available to Cuda (or any other D.R. Horton employee) under the FLSA would be available in an individual arbitration pursuant to the subject arbitration agreement. Finally, unlike in *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294 (5<sup>th</sup> Cir. 2004), *Daugherty v. Encana Oil & Gas (USA), Inc.*, 2011 WL 2791338 (D. Colo. July 15, 2011), and *Morrison v. Circuit City*, the arbitration agreement at issue in this case does not provide for fee-splitting or cost-splitting.

As noted by D.R. Horton in its previous briefs, several U.S. Courts of Appeals have held that class action waivers do not necessarily deprive employees of their substantive rights under the FLSA. See *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4<sup>th</sup> Cir. 2002) ("[Plaintiff] points to no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute. His inability to bring a class action, therefore, cannot by itself suffice to defeat the strong congressional preference for an arbitral forum."); *Carter v. Countrywide Credit Industries*, 362 F.3d 294 (5<sup>th</sup> Cir. 2004) (rejecting argument that employees' inability to proceed collectively deprived employees of substantive rights under the FLSA); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11<sup>th</sup> Cir. 2005). Therefore, the Board should presume that such agreements are enforceable under federal law, especially where, as here, there is no evidence to suggest that employees will be unable to vindicate their rights through individual arbitration.

#### IV. Conclusion

For the foregoing reasons and pursuant to the previously-submitted briefs by D.R. Horton, the decision and recommended Order of the Administrative Law Judge should be upheld by the Board on those points excepted to by the General Counsel, and the complaint against D.R. Horton, Inc. should be dismissed.

### Respectfully submitted,

### /s/Mark M. Stubley

Mark M. Stubley Ogletree, Deakins, Nash, Smoak & Stewart, P.C. 300 North Main Street Greenville, SC 29601 Telephone: 864-271-1300 Facsimile: 864-235-8806

Bernard P. Jeweler Ogletree, Deakins, Nash, Smoak & Stewart, P.C. 1909 K Street NW, Suite 1000 Washington, D.C. 20006 Telephone: 202-887-0855 Facsimile: 202-887-0866

Attorneys for D. R. Horton, Inc.

Dated: August 24, 2011

## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

D. R. HORTON, INC.	)
and	) Case 12-CA-25764
MICHAEL CUDA an Individual	) ) )
CER	RTIFICATE OF SERVICE
I certify that the foregoing Re	espondent's Answering Brief in Response to the Brief for the
Secretary of Labor and the Equal En	ployment Opportunity Commission as Amicus Curiae was
served on August 24, 2011 by electro	onic mail on the following:
John F. King john.king@nlrb.gov	Charles S. Sims <a href="mailto:csims@proskauer.com">csims@proskauer.com</a>
David Cohen david.cohen@nlrb.gov	Mark Theodore <a href="mailto:mtheodore@proskauer.com">mtheodore@proskauer.com</a>
Michael Rubin mrubin@altber.com	Lawrence Z. Lorber <u>llorber@proskauer.com</u>
Caroline P. Cincotta ccincotta@altber.com	Patrick J. Szymanski pat.szymanski@changetowin.org
Cliff Palefsky cp@mhpsf.com	Doreen Davis dsdavis@morganlewis.com
Judith A. Scott judy.scott@seiu.org	Thomas A. Linthorst <u>tlinthorst@morganlewis.com</u>
Janet Herold janet.herold@seiu.org	William J. Emanuel wemanuel@littler.com
Deborah J. La Fetra djl@pacificlegal.org	Henry D. Lederman <u>HLederman@littler.com</u>
H. Scott Leviant	Alexa L. Woerner

scott@spiromoss.com

AWoerner@littler.com

Samuel Estreicher sestreicher@jonesday.com

G. Roger King <a href="mailto:rking@jonesday.com">rking@jonesday.com</a>

George S. Howard, Jr. gshoward@jonesday.com

Paul D. Ramshaw paul.ramshaw@eeoc.gov

Edward D. Sieger sieger.edward@dol.gov

H. Gelin Finler

H. Ellis Fisher